

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY E. PULLEY)	
Claimant)	
VS.)	
)	
MIDLAND BRAKE, INC.)	Docket No. 193,636
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent requested Appeals Board review of the February 26, 1997, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument by telephone conference on July 23, 1997.

APPEARANCES

Claimant appeared by her attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Garry W. Lassman of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jerry R. Shelor of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Special Administrative Law Judge.

ISSUES

The respondent appealed the following issues for Appeals Board review:

- (1) The average weekly wage of the claimant.
- (2) The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) Claimant was injured while performing repetitive work activities with both upper extremities for the respondent. Claimant had been employed by the respondent since 1981 when both hands and arms became symptomatic in June 1990. Respondent provided medical treatment and claimant was eventually taken off work on October 31, 1990. After nine months of conservative treatment, claimant was returned to work for the respondent on or about August 1, 1991, with restrictions of no overtime work and to avoid use of airguns. At the time of the regular hearing, claimant remained employed by the respondent, however, she was not performing the production job she had on the date of her injury. That particular job was on the coiled cable line which had been eliminated by the respondent.

Jon K. Anderson, safety and health coordinator for the respondent, testified on the issue of claimant's average weekly wage both pre-injury and post-injury. Mr. Anderson established that claimant was earning a straight-time hourly rate of \$6.47 at the time she was taken off work on October 31, 1990, because of her bilateral upper extremity injuries. On the date of Mr. Anderson's deposition, August 20, 1996, Mr. Anderson testified that claimant was earning a straight-time hourly rate of \$7.75. Additionally, a wage statement was introduced into evidence at Mr. Anderson's deposition that showed claimant's gross wages and the number of hours worked from 1989 through 1995.

The Special Administrative Law Judge found November 1, 1990, as the date of accident for the purpose of computation of the award. Neither party appealed that finding. Therefore, the Appeals Board accepts November 1, 1990, as claimant's date of accident for the purpose of computation of the award. Accordingly, the computation of claimant's gross average weekly wage should be determined pursuant to the provisions of K.S.A. 1990 Supp. 44-511.

In this case, the record established that claimant was a full-time worker paid by the hour. Therefore, the method to follow in the computation of claimant's gross average weekly wage is found at K.S.A. 1990 Supp. 44-511(b)(4). That subsection of the statute provides generally that a full-time hourly employee's gross average weekly wage shall be

determined by taking the employee's straight-time hourly rate times 40 hours and adding to that sum the employee's average weekly overtime. The overtime is found by averaging the amount earned in excess of the straight-time pay earned by the employee during 26 weeks immediately preceding the accident.

The burden of proving the various conditions on which claimant's right to an award of compensation depends is placed on the claimant. See K.S.A. 1990 Supp. 44-501(a). The specific amount of claimant's average weekly wage is no exception. In the case at hand, the record contains testimony from the claimant and Mr. Anderson, a representative of the respondent, that following claimant's injury she was restricted from working overtime. As previously noted, the record contains evidence of the total amount of claimant's yearly earnings from 1989 through 1995, but the straight-time earnings are not separated from the overtime earnings. The Appeals Board concludes the only persuasive and accurate evidence contained in the record in regard to claimant's pre-injury average weekly wage is the straight-time hourly rate of \$6.47 per hour times 40 hours or \$258.80 and the post-injury straight-time hourly rate of \$7.75 times 40 hours or \$310 per week.

(2) The Special Administrative Law Judge found claimant had no loss of ability to earn comparable wage, but did find she had an 80 percent loss of ability to perform work in the open labor market. The Special Administrative Law Judge further found that claimant was entitled to a 40 percent work disability by averaging the zero percent loss of comparable wage with the 80 percent loss of labor market.

The respondent argues claimant is limited to her permanent functional impairment because she has returned to work for the respondent at a comparable wage. See K.S.A. 1990 Supp. 44-510e(a). If a work disability is awarded, the respondent then argues that claimant's entitlement to work disability is a lesser percentage because claimant's preexisting impairment restrictions should have been taken into consideration.

The claimant counters and argues that claimant's pre-injury wage is not comparable to her post-injury wage because claimant is restricted from working overtime. Furthermore, even if it is determined that claimant is earning a comparable wage or more, claimant has presented evidence in the record through vocational expert, Jerry D. Hardin, that the claimant's work-related injuries resulted in her suffering a loss of her ability to work in the open labor market. Therefore, the claimant contends the presumption against work disability has been overcome. See K.S.A. 1990 Supp. 44-510e(a) and Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993), *rev. denied* 253 Kan. 859 (1993).

As previously found above, claimant's post-injury average weekly wage exceeds her pre-injury average weekly wage. Therefore, the presumption against work disability applies and claimant is limited to her permanent functional impairment unless rebutted. The Appeals Board is mindful that both vocational experts, who testified in this case, found that claimant as a result of her work-related injuries had lost a portion of her ability to perform work in the open labor market. Although claimant's work-related injuries resulted in some

permanent restrictions, respondent returned claimant to an unaccommodated job earning a comparable wage. Furthermore, the Appeals Board finds the facts in this case can be distinguished from the Locks case. In Locks, the claimant was earning a comparable wage on a temporary job and her injuries presented an ongoing progressive health problem. In this case, claimant was returned to a regular production job and there is no evidence that claimant's injuries present an ongoing health problem. Therefore, the Appeals Board concludes the claimant failed to overcome the statutory no work disability presumption.

Two physicians, who examined the claimant, testified and issued opinions in regard to claimant's permanent functional impairment. Bernard M. Abrams, M.D., of Kansas City, Missouri, examined the claimant and found as a result of her work-related bilateral upper extremity injuries claimant had suffered a 23 percent permanent functional impairment of the body as a whole. Vito J. Carabetta, M.D., of Olathe, Kansas, examined the claimant and found she had suffered fibromyositis effecting her bilateral upper extremities caused by her repetitive job duties while working for the respondent. Dr. Carabetta opined that claimant suffered an 8–10 percent functional impairment of the body as a whole as a result of those work-related injuries.

The Appeals Board has examined the reports and testimony of those two physicians and finds that both of the physicians' opinions should be equally taken into consideration in determining permanent functional impairment. Accordingly, the Appeals Board finds that the claimant is entitled to permanent partial disability benefits based on a permanent functional impairment of 16 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated February 26, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Nancy E. Pulley, and against the respondent, Midland Brake, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on November 1, 1990, and based upon an average weekly wage of \$258.80.

Claimant is entitled to 39.57 weeks of temporary total disability compensation at the rate of \$172.54 per week or \$6,827.41, followed by 375.43 weeks of permanent partial disability compensation at the rate of \$27.61 per week or \$10,365.62, for a 16% permanent partial general disability, for a total award of \$17,193.03.

As of November 30, 1997, there is due and owing claimant 39.57 weeks of temporary total disability compensation at the rate of \$172.54 per week or \$6,827.41,

followed by 329.86 weeks of permanent partial disability compensation at the rate of \$27.61 per week in the sum of \$9,107.43 for a total of \$15,934.84, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,258.19 is to be paid for 45.57 weeks at the rate of \$27.61 per week, until fully paid or further order of the Director.

All remaining orders of the Special Administrative Law Judge contained in the Award are adopted by the Appeals Board as if specifically set forth in this Order.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Jerry R. Shelor, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director